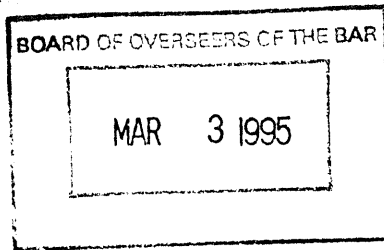


STATE OF MAINE



DOCKET NO. Bar-90-15

IN RE:

Thomas R. Acker

*
* FINDINGS AND RECOMMENDA-
* TION ON PETITION FOR REIN-
* STATEMENT TO THE BAR
*

PROCEDURAL HISTORY

On November 21, 1994 the Petition for Reinstatement dated April 1, 1994 filed by Thomas R. Acker was heard by Panel D of the Grievance Commission, comprised of Craig A. McEwen, Ph.D., John P. Foster, Esq. and Jon S. Oxman, Esq. Petitioner Acker, represented by Attorney Louis Kornreich, testified in support of his application, and also presented testimony by Judy Potter and Douglas Trottier. The Board of Overseers, represented by Attorney Karen Kingsley, presented testimony by Dr. Curtis Winchenbach, Dr. Desmond Donegan, Dr. Saul Katz, Dr. Ronald Sawyer, and Richard Foley. Each party presented documentary evidence. The Panel had before it Exhibits A through H of the Petitioner (Exhibits G and H were pre-admitted and received by the Panel by mail after the close of the hearing) and Exhibits 10-17, 20-24, 26-30, 32, 33, 36, 37 and 40-42 of the Board.

Prior to the hearing, the Panel considered and disposed of Petitioner's Motion in Limine to Limit Reinstatement Inquiry. Petitioner argued that he should only have to present evidence

related to his admissions of wrongful conduct made in the context of his resignation from the Bar. The Board argued that it could present any allegations of wrongful misconduct, outside or within the conduct admitted by Petitioner. In denying the motion, the Panel ruled that in the context of a reinstatement petition, it cannot perform its duties while wearing blinders. Although the rules require Petitioner to recognize the wrongfulness of "the misconduct," the Panel must also determine whether the Petitioner possesses the requisite honesty and integrity to resume the practice of law and that his reinstatement would be consistent with the public interest. The Panel informed the parties that it would consider proven allegations of misconduct, whether or not originally pled and/or admitted. However, Board counsel was required to inform Petitioner in advance of the hearing of any matters not included within the original charges against Petitioner which the Board intended to present.

The documents before the Panel included the affidavit of Mr. Acker dated October 31, 1990 in support of his resignation; the resignation of Mr. Acker of the same date; the December 11, 1990 opinion of Justice Roberts accepting the resignation; the petition for reinstatement dated April 1, 1994 and a supporting affidavit by Mr. Acker dated March 31, 1994, and the order of July 1, 1994 of Justice Roberts releasing the original affidavit from impoundment.

EVIDENCE

Mr. Acker testified to his pre-resignation activities as an attorney and business advisor. Admitted to the bar in Ohio in 1977, he moved to Maine in 1977 as a loan officer of a commercial bank. In that capacity, he developed a clientele of health care providers whom he assisted in the location, financing and operation of professional practices. In 1979, he joined a South Portland accounting firm. He worked there for two years assisting clients with practice operations and tax matters. He also consulted with clients about tax planning and ran computer models and software applications for clients involved with retirement planning. In 1981, he left the accounting firm and established his own accounting, tax preparation and management consulting business. His business became actively involved with the real estate market in Southern Maine, dealing with syndications, management and ownership of real estate investment partnerships.

Prior to his 1986 admission to the Maine Bar, Petitioner, except for a will drafted for a business client, did not practice law. Although his law partner did practice law after 1986, Petitioner continued to be primarily involved in the business, as distinguished from the legal affairs, of real estate. Except for one syndication, his partner did not provide legal services for the real estate projects and outside counsel were employed instead. In a condominium project Petitioner did act as counsel, but was not a participant.

The initial successes in the real estate market led to the acquisition of certain properties at prices too high to support the projects. A particular project, New Meadowbrook Associates, led to a number of the complaints against Petitioner and contributed to his eventual business and professional problems. In one instance, substantial payments (\$35,000.00) made by several of the physician or dentist investors were intermingled with other funds for other projects of the business firm that Mr. Acker was a partner in. As a result, those participants had to pay that amount a second time for a release from liability to the financing bank.

At the same time the New Meadowbrook project was unfolding, many other projects were in the process of formation and funding. In addition, Petitioner advised clients to invest in other real estate syndications. Some of these, especially earlier in the eighties, had been profitable, but later projects were failures and required investors to continue to meet cash calls to avoid foreclosure and liability to the banks. This downward spiral of failures and personal claims caused Petitioner to file for individual bankruptcy in October of 1989. In that proceeding, all creditors had the opportunity to object to the discharge of Petitioner. A number of objections to discharge were filed as adversary actions; none of those resulted in any findings of fraud, use of funds for personal gain, or otherwise. The Trustee in Bankruptcy confirmed that, in his careful review of the partnerships, Mr. Ackers' lifestyle and his bookkeeping, he uncovered

no evidence of criminality or intent to defraud (Petitioner's Exhibits A, B and C).

The Panel found itself puzzled over the resignation from the Bar by Mr. Acker since the ethical violations he was accused of would have been likely to cause him to be only reprimanded at worst. Mr. Acker admitted conflicts of interest and violations of the prohibition of business dealings with clients, but even then it was not certain that those Bar Rules would have applied to Mr. Acker's situation, where he was engaged in financial planning rather than legal representation of his clientele. He admitted that although he did not believe he was practicing law, those financial clients for whom he provided incidental legal services, and those investors who knew he was a member of the Maine Bar, felt or could have felt him to be "protecting" them or acting on their behalf as a lawyer. Petitioner asserted, in retrospect, that the Maine Bar Rules imposed on him a higher standard of integrity even in his business undertakings and that he had violated the trust of his business clients in this light.

It appears that a combination of Mr. Acker's profound business failure, his embarrassment, the anger by investors who lost or were at risk to lose a great deal of money, and his clinical depression suggested to Petitioner that resignation from the Bar was the appropriate course.

Mr. Acker also testified affirmatively with respect to all the requirements of the Bar Rules for reinstatement. The Board fully cross-examined Mr. Acker. The Board demonstrated that he

has been treated for depression, and in 1988 and 1989 he had been hospitalized and under the care of a psychiatrist for depression. Mr. Acker has been receiving disability payments and has been working since his resignation part-time in a tax and financial planning business. He responded in detail, without evasion, to the questions of Bar counsel as to the extent of his law practice before his resignation, and his formation and the participation in real estate partnerships. He assured the Panel that if reinstated he would not use his law degree as a marketing tool, and that he would consider all his dealings with clients or advisers as subject to the Maine Bar Rules. He wishes to serve those clients who have stayed with him, and new clients, in those tax, real estate and business practice areas in which he has stayed abreast of the law. He also assured the Panel that he had learned not to advise his tax and estate planning clients about investment matters or to enter investments jointly with them.

Attorney Judy Potter of Cape Elizabeth testified on behalf of Mr. Acker. A practicing lawyer and professor at the University of Maine Law School, she noted a longstanding professional relationship with the Petitioner. Though she was generally aware of Mr. Ackers' notoriety, she continued and continues to find him trustworthy and competent. She never found him to misuse or misallocate funds and has found him to be competent in the domestic and related tax matters with which she is familiar. But for the risk of impeachment because of his disbarment she would use him today, as she has in the past, as an expert witness. He serves

as her personal tax accountant, and she testified positively about Mr. Acker's moral character and competency in tax and business related areas. She felt his readmission would not be detrimental to the standing of the Bar or the administration of justice. Having discussed the cause of events with Petitioner, Attorney Potter felt he is remorseful, understands the Bar Rules and possesses the requisite honesty and integrity to practice law. In summary, Attorney Potter had no reservation about Mr. Acker's reinstatement.

Reverend Douglas Trottier, the Minister of Pastoral Care of the Woodfords Congregational Church, also supported the reinstatement of the Petitioner. Mr. Acker has been a parish member for about two years and has been active in the lay ministry of the church. Petitioner has had two intensive pastoral assignments and has worked in other church activities as well. Subject to active supervision and monitoring as a lay minister, Petitioner has responsibilities towards vulnerable persons, whether they are elderly or in personal crisis. Rev. Trottier was aware of the prior conduct of Mr. Acker, but testified without reservation in favor of his reinstatement to the Bar, characterizing Petitioner as deeply concerned about people's welfare, compassionate and highly respected by members of the pastoral staff.

Since some suspicions were voiced about allowing Mr. Acker into a lay ministry position with its attendant level of responsibility, he was initially subjected to a high level of screening and supervision. The Reverend stated that Petitioner clearly was

not involved in the church for "résumé" purposes. In each category of consideration under Rule 7.3(j)(5), Rev. Trottier unequivocally supported Mr. Acker. He stressed that early in the screening process, Petitioner demonstrated his sorrow and repentance for those hurt by his actions, and that Petitioner possessed character traits of ethics, personal morality and honesty.

The first Board witness was Dr. Curtis Winchenbach, a Portland physician who sought accounting and financial advice from Petitioner. He testified that as a result of his investment in several projects and the \$35,000 investment intermingled with other funds, he sustained a major and continuing financial loss and felt strongly that Petitioner bore responsibility for that loss and should not be readmitted. His principal complaints against Mr. Acker seemed to be two: the failure to properly account for investment funds, and the failure to "protect" the investor and to fully disclose the risks and limitations of investments. The Doctor did admit that he did not think that Mr. Acker was his lawyer, but felt because he was a lawyer, Acker had a moral responsibility to protect him. Dr. Winchenbach's relationship with Mr. Acker began in 1982, well before Mr. Acker was a member of the Maine Bar.

Dr. Desmond Donegan also commenced receiving accounting services in about 1982 from Mr. Acker. Having complete trust in his accountant, he named him Trustee of his children's trust. He testified that to date he had lost a total of about \$350,000.00 in the real estate partnerships, and faulted Petitioner for fail-

ure to explain the breadth of this potential liability (i.e. the difference between limited and general partnerships) and for the loss of the \$35,000.00 partnership investment noted above. He testified that readmission of Mr. Acker would be an inappropriate message to the public and doubted Petitioner's honesty and integrity in handling client funds. He still felt, despite a failure to prosecute his fraud claim, that Mr. Acker's actions as regards the investments, especially the misapplied \$35,000.00 check, were fraudulent.

Dr. Saul Katz, a Portland cardiac surgeon, was assisted by Acker in 1980 in setting up his practice, and thereafter took Petitioner's advice as to real estate investments that were initially successful and later failures. He felt that partners were not told the truth about the real level of distress within the partnerships as they were in decline. Dr. Katz felt he was misled by Mr. Acker about the quality of the real estate in one or more partnerships. In summary, this witness felt Mr. Acker was dishonest in his business relationships, and was disturbed because Petitioner never expressed his contrition or remorse for his losses. He felt that a lawyer's stock in trade is ethics and honesty, and that the intermingling of funds and failure to adequately disclose the partnerships' status should bar Mr. Acker from being given an opportunity to allow a client to trust him for advice and counsel.

Ronald Sawyer, a general dentist from Bath, testified that he first met Petitioner in his role as a commercial loan officer.

When Mr. Acker opened his own practice, Dr. Sawyer became his tax and financial advisee. Dr. Sawyer was socially friendly with Petitioner as well. He was an active investor and even brought suggestions for purchase and syndication to Petitioner. Petitioner was first named trustee for, then guardian of the Sawyer children in Dr. Sawyer's will. Although Dr. Sawyer considered Petitioner his tax advisor, he did not consider himself a legal client, although he was conscious of Acker's status as a lawyer. Because of his total losses of about \$200,000.00, Dr. Sawyer testified he has been on the verge of bankruptcy for six years. His domestic relations have been impaired because of his wife's anger with him for misplacing his trust in Mr. Acker. In articulating his anger and disappointment, Dr. Sawyer felt that what he perceived to be a betrayal of personal trust was akin to a breach of fiduciary duty. He felt, in retrospect, the Petitioner should have explained to investors all the risks of each investment.

Richard Foley was the final Board witness. He solicited Thomas Acker to invest money for him in several different projects. Mr. Acker showed Mr. Foley cash flow and return summaries for a number of projects, and allegedly told Mr. Foley that he was a member of the Maine Bar in 1985. The Panel believes that Mr. Foley was mistaken in this assertion. His allegations were that Mr. Acker was not cooperative with respect to resolving partnership problems after Mr. Foley became involved in trying to preserve the projects he had invested in. He felt that Petition-

er has not demonstrated remorse and had misrepresented himself. He did not recall that his fraud allegations against Petitioner had been dismissed with prejudice without payment of damages by the estate or Mr. Acker. Although he brought complaints of Mr. Acker's conduct to the attention of the U.S. Trustee and the Maine Attorney General, no actions have ensued. In contrast to the physician witnesses, Mr. Foley testified that Mr. Acker was a "high pressure" salesman. The Panel did not find Mr. Foley to be a particularly credible witness.

FINDINGS OF FACT

The Panel has considered the memoranda of counsel, the documentary evidence, and the testimony presented by each party. It concludes that the Petitioner has sustained his burden of demonstrating the basis for the findings below by clear and convincing evidence. It makes the following findings of fact pursuant to the mandate of Bar Rule 7.3(j)(5):

A. The Petitioner has complied with the terms of his prior disciplinary orders. After the close of the evidence, Bar counsel alleged for the first time in her brief that the Petitioner has not filed an affidavit with the Court attesting to client notification after his resignation. The Panel did not have evidence presented to it other than Petitioner's oral and written statements that he has complied with the terms of prior

disciplinary orders. Since our understanding is that Petitioner was not generally involved in litigation, compliance with the affidavit requirement may not have been particularly relevant. In any event, Bar counsel raising this issue at this late date, after the close of evidence, rather than by motion or objection prior to the hearing, seems inappropriate to the Panel.

We conclude that we must leave it for the Court during its hearing on this matter to determine whether any necessary affidavit was filed.

B. The Panel finds that Petitioner has not engaged in the unauthorized practice of law during his disbarment. The Board alleged that the advertisement by Petitioner of his tax, estate and business planning activities (see Board Exhibit 36) during the resignation period represents Petitioner's continuing attempt to practice law or to hold himself out as a lawyer. Although it might have been prudent for Petitioner to discuss the style of his advertising with Bar counsel after his resignation, we cannot agree that tax, estate and business planning services constitute the unauthorized practice of law.

C. The Petitioner has acknowledged and recognizes the seriousness and wrongfulness of his conduct. This acknowledgment was clear, broadly framed, and repeatedly made by Mr. Acker in his testimony. In addition, he

testified that he recognized and admitted his failure to communicate and to apologize later to the complainants who lost money and held him accountable. That failure was plausibly attributed to advice of legal counsel in the face of pending litigation, to severe depression triggered by his own business losses and his feeling of responsibility to other investors, and to some anger that he was being blamed personally for the failures of the market.

Thus, his testimony was perfectly consistent with that of the doctors who testified that Mr. Acker had failed to apologize and take responsibility for their losses. None of the complaining witnesses was present for Mr. Acker's testimony.

We further note that after the money contributed by the doctors was intermingled with other business assets and lost, Mr. Acker wrote to notify them of the problem and took "responsibility" for the loss although he attributed it to the actions of others in his business.

D. The Petitioner has not engaged in any other professional misconduct since his resignation. This Panel has not in fact concluded that Mr. Acker engaged in misconduct prior to his resignation. Nor must we. The testimony of Mr. Acker and the witnesses for the Board leaves doubt about whether the complainants

against him were (or perceived themselves to be) clients of Mr. Acker in his role as attorney. Thus, it is not entirely clear that Mr. Acker's behavior as business advisor and partner was directly governed by Bar Rules. In retrospect, Mr. Acker asserted that it was, however. In his testimony he repeatedly claimed that he now saw that he owed a higher duty to his business partners because he was an attorney.

However the matter of the initial misconduct is perceived, there was no testimony or evidence that Mr. Acker has engaged in the practice of law or in any misconduct in the course of his subsequent work as tax advisor.

E. The Petitioner has the requisite honesty and integrity to practice law. The Panel found support for this finding in the testimony of Attorney Potter and Reverend Trottier.

F. The Petitioner has kept abreast of developments in tax and business law and is competent in the areas in which he intends to focus his practice. Our concern about Mr. Acker's general knowledge of the law is addressed in our recommendation, infra.

G. The Petitioner's reinstatement, although it would anger several witnesses who lost substantial funds because of investments organized and/or recommended by Petitioner, will not be detrimental to the

integrity and standing of the Bar, the administration of justice, and the public interest. This is a difficult standard to evaluate because it could preclude an honest and capable lawyer from reentering the practice of law if he or she was unpopular or "notorious." Indeed we expect that should Mr. Acker be readmitted, the Bar will receive adverse publicity. It is the view of this Panel, however, that the standard is not meant merely as a directional gauge of the winds of public opinion. Instead, it is a standard that focuses on the capacity and character of the individual at the time of readmission and of the contribution that that individual would make to the Bar and to the administration of justice.

H. The Petitioner has the moral qualifications, competency and learning in the law required for admission to practice law in this State.

RECOMMENDATION

Although the Panel recommends that Petitioner's request for reinstatement to the Bar be supported by the Board, it also has several concerns. In light of evidence that Petitioner continues to receive disability payments for his psychiatric condition, it may be appropriate to obtain an opinion from Petitioner's treat-

ing psychiatrist that he is not presently emotionally incapacitated from the practice of law.

In addition, Petitioner contemplates a focused potential practice area. If a general awareness of developments in the law is required, the Court may wish to require the Petitioner to pass all or a part of the Bar examination currently required for applicants to the Bar. The Panel recommends at least, in light of major changes in the law and in the Bar Rules over the period since Petitioner's resignation, that Petitioner be required to certify, prior to his reinstatement, that he has reviewed the current Bar Rules in their entirety and read the Maine Bar Association Legal Year in Review materials for the years 1991-1994.

Finally, the Court may also wish to require Petitioner to physically separate any business, tax or accounting non-legal advisory activities from Petitioner's legal practice, and to bar Petitioner from recommending to a client any investment device or instrument in which Petitioner is either an investor or for which Petitioner has rendered legal advice or services.

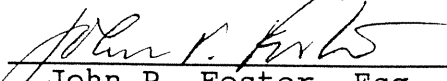
Dated: March 1, 1995



Jon S. Oxman, Esq., Chair



Craig A. McEwen, Ph.D.



John P. Foster, Esq.